United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2313

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

NICHOLAS HILDEBRANDT, LEONARD TORRES, ANGELO SEIJO, and JAMES DiDOMENICO,

Appellants.

Docket No. 74-2313

BRIEF FOR APPELLANT ANGELO SEIJO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the Government's failure to disclose the prior conviction and the perjury at trial of its principal witness requires reversal of appellant Seijo's conviction.

2. Whether in sentencing Seijo to fifteen years' imprisonment the District Court acted on the basis of erroneous information, in violation of the sentencing standards and in abuse of sentencing discretion.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lloyd F. MacMahon) rendered October 1, 1974, after a jury trial, convicting appellant Seijo of conspiracy to possess with intent to distribute and to distribute a Schedule I narcotic drug controlled substance (Count I) and of possession with intent to distribute and distribution of 259.5 grams of heroin on June 5, 1974 (Count IV) in violation of Sections 812, 841(a)(1), 841(b)(1)(A) of Title 21, United States Code and Section 2 of Title 18, United States Code. Appellant Seijo was acquitted of the charge of possession with intent to distribute and distribution of 34.0 grams of heroin on June 5, 1974 (Count V). Count VI was dismissed with the consent of the Government. Seijo was sentenced to fifteen years imprisonment and three years special parole on each of Counts I and IV, sentences to run concurrently.

The Legal Aid Society was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The Government's case consisted primarily of the testimony of Leonard Torres, an alleged co-conspirator and named defendant who pleaded guilty before trial. Certain aspects of Torres' testimony were corroborated by Joseph Scamardella, an undercover agent for the New York City Police Department and by various other New York City Police Officers and a Drug Enforcement Administration special agent who surveilled various parts of the transactions Torres described.

Facts Relevant to the Brady Issue

In the course of the pre-trial informal discovery ordered by the trial judge, counsel for Seigo requested the Assistant District Attorney to furnish a copy of Torres' "rap" sheet. (See the affidavit of Assistant United States Attorney Fortuin, set forth as **C** of appellant Seijo's separate appendix, at 2). The Assistant United States Attorney informed defense counsel that Torres had no prior convictions. (Id. at 2). In fact, the United States Attorney's office had received a copy of Torres' rap sheet prior to trial, which disclosed that Torres had a prior felony conviction for possession of a controlled substance, marijuana, in 1969. (Id. at 3; see also the rap sheet, attached to Mr.

Fortuin's affidavit as exhibit 1.*)

In the course of the direct examination of Torres, Assistant United States Attorney Fortuin asked him whether he had ever been arrested other than in connection with this case. (110). Torres responded by describing only his arrest as a child for taking bats and balls out of a park facility, saying that the charges concerning that incident were eventually dismissed. (111). During cross-examination, when Torres was specifically asked whether he had ever been arrested for drugs while in the armed services, he denied any such arrest. (248). Taking advantage of this testimony, the Assistant United States Attorney sought to bolster Torres' credibility by portraying him as "the kid", less "streetwise" than the other defendants (306-7), who had been lured into the charged conspiracy by them. In summation, the Assistant United States Attorney told the jury that in evaluating Torres' credibility, they should "look at his prior record." (369). The Assistant urged that since Torres had never been arrested except as a child for "stealing some baseballs at school", his testimony should be credited. (370).

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* Mr. Fortuin claims that he personally did not receive the rap sheet until after December 7, 1974. (Mr. Fortuin's affidavit at 3).

Testimony at Trial

Torres' testimony concerning Seijo's alleged involvement in the crimes charged * was as follows:

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* Torres' testimony concerning the counts of the indictment in which Seijo was not named was as follows:

Concerning the April 11, 1974, transaction charged in Count II of the indictment, Torres testified that in early April, one Tommy Frano asked Torres and defendant Di Domenico to obtain some narcotics for him. (82-3). Di Domenico, accompanied by Torres, went to the home of defendant Hildebrandt and arranged for the narcotics. (83-4). When they subsequently informed Frano that arrangements had been made, Frano said he would notify the friend for whom he was getting the drugs. A few days later, Torres and Di Domenico met with Frano and his friend, who turned out to be Joseph Scamardello, an undercover agent, to arrange for the transaction. (85). According to the arrangements made at that meeting, Torres went the following morning, April 11, 1974, to Hildebrandt's shop, picked up a package, and together with Frano and Di Domenico, went to meet Scamardello. There, Frano handed the package to Scamardello, who handed Frano some money. (87). Following this transaction, the parties discussed future deals and then parted. (87).

Concerning the April 18, 1974, transaction charged in Count III of the indictment, Torres testified that sometime after the April 11th transaction, Scamardello telephone him, asking to purchase some more narcotics. (88). Torres made arrangements with Hildebrandt to get the narcotics, and, the following day, sold 1/8th of a kilogram of heroin to Scamardello for $4900. (91). Thereafter, Torres turned this money over to Hildebrandt. (91-2).

Torres also testified that between the April 18th and June 5th transactions, an unsuccessful attempt was made at another transaction between himself and Scamardello. Shortly after the April 18th transaction, Scamardello again telephoned Torres, asking to purchase 1 1/2 kilograms of heroin. When Torres attempted to arrange for this purchase with Hildebrandt, the latter refused to participate in a single transaction for that large an amount of drugs, and suggested instead that seven smaller transactions be arranged. Scamardello however, refused this suggestion, and no further efforts were made to transact the drugs at that time. (94-5).

According to Torres, between the April 18th transaction (charged in Count III of the indictment) and the June 5th transaction (charged in Count IV of the indictment), he got into trouble with Hildebrandt, his drug supplier, because Torres failed to secure payment for three ounces of heroin provided him by Hildebrandt. Torres testified that he had delivered this heroin to Frano, a police informant, who then disappeared without paying for it. (92-4)*. According to Torres, he was subsequently called to a meeting at the Neckles Beach Bar with Hildebrandt and appellant Seijo. (97-98). Torres claims that at this meeting, both Hildebrandt and Seijo asked him when he was going to come up with the money. (97). Torres also claims that Seijo said he was the "guy behind the whole thing.", that he had lent the money to Hildebrandt, and wanted to be paid back, and that he threatened to kill Torres' wife and parents if Torres didn't repay the money. (97-9).

Concerning the June 5, 1974, transaction charged in Count IV, Torres testified that several weeks later Scamardello again phoned him, asking to purchase 2/8ths of a kilo-

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* Numeral in parenthesis are references to the trial transcript.

gram of heroin. (102). In response to this request, Torres went to the Neckles Beach Bar and arranged with Hildebrandt to provide the drugs Scamardello had requested. (103). According to Torres, Seijo was present during this conversation. (102). Thereafter, Torres told Scamardello to meet him at the Howard Johnson's at Fordam Road and Crotona Avenue on June 5th. (103-4).

Early in the evening of June 5th, Torres went to see Hildebrandt, who informed him that the drugs weren't ready yet, and he should come back later. (104). Torres then proceeded to the Howard Johnson's and told Scamardello that the drugs would be a little late. (104). During this first trip, Torres took two friends, "Poochie and John", along to protect him in case of trouble. (105-6). Torres testified that he did not tell these friends that he was participating in a drug transaction, but rather merely informed them that he was going to receive some money. (106).

Torres then left Scamardello at Howard Johnson's and went to Hildebrandt's shop. According to Torres, both Hildebrandt and Seijo were there. In response to Torres' question, they said that they had "it," and Hildebrandt handed Torres a package. (107-8). Torres then re-entered

his car, a 1973 Toyota, and returned to Howard Johnson's, followed by Hildebrandt and Seijo in a 1965 Chevrolet. (108)*. On the way, they stopped by a Cadillac dealer's showroom on Fordham Road, where Torres claims, Seijo told him that when he arrived at Howard Johnson's, he should stop, and walk into the Howard Johnson's, and that Seijo would drive the Toyota into the parking lot behind him. (108).

When they arrived at the Howard Johnson's, Torres got out of his car and walked into the Howard Johnson's parking lot. Seijo got out of the Chevrolet, entered Torres' Toyota, and followed him into the parking lot, where Seijo parked the car. Hildebrandt likewise parked the Chevrolet in the lot. (109). Thereupon Torres entered Scamardello's car, and told Scamardello that he had "it." Scamardello got out of the car, removed some money from the trunk, and re-entered the car, handing the money to Torres. At that moment, agents surveilling the lot arrested Torres. (110).

Concerning the illegal possession of a small packet of heroin by Seijo, charged in Count V, Torres testified that he had seen Seijo secret this package in his pants earlier in the evening. (240-1).

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* According to Torres, he had previously given this Chevrolet to Hildebrandt as partial payment for the money Torres owed Hildebrandt. (102).

The Government's other witnesses corroborated certain aspects of Torres' testimony. Thus, Scamardello confirmed that the meetings and phone conversations between Torres and Scamardello which Torres described in his testimony had taken place. (40-65). He also testified that during his conversation with Torres on April 24, 1974, Torres had referred to his supplier as "Nick," presumably Nicholas Hildebrandt, (53-4), and that some of these conversations had been recorded. (49, 62-3). Scamardello and police detective Drucker both testified that Frano, who had initially introduced Scamardello to Torres, was a police informant. (40, 163).

Police officer Flynn testified that he observed from a distance the meeting between Scamardello, Frano, Di Domenico and Torres on April 11, 1974. (130-31). Flynn, Drug Enforcement Administration special agent Biss, and police officers Newton and Drucker testified to observing Seijo drive the Toyota into the Howard Johnson's parking lot behind Torres on June 5, 1974 and to the arrest of Torres, Seijo, and Hildebrandt. (115-9, 130-37, 148-54, 163-77). Newton also testified that after Seijo and Torres were arrested, they were placed side by side in the back seat of a police car. When Newton observed Seijo moving around

in the seat, he removed the seat and discovered a packet of heroin underneath. (119).

Police officer Feurtado testified as to the arrest of Di Domenico on June 6, 1974. (190). The Government introduced no evidence whatsoever to corroborate Torres' claim of the alleged meeting in April between Torres, Seijo, and Hildebrandt, or the alleged meeting at Hildebrandt's shop.

Seijo testified in his own defense. He has never been convicted of any crime, or even arrested prior to his arrest in this case. (282-3). He testified that he knew Hildebrandt, who was Seijo's wife's cousin's husband, but that he had not known that Hildebrandt was a trafficker in narcotics. (297). On June 5th, Seijo went to the boatyard near the Neckles Beach Bar to work on a rowboat he had bought for his son. While there, he entered the Bar where he ran into Charles Albrecht, who was there to work on a boat belonging to Hildebrandt. They decided to help each other. (285). The two men worked on Hildebrandt's boat for several hours, while drinking several cans of beer a piece. (285). About mid-afternoon, Hildebrandt arrived at the boatyard to aid in the work. (285). After finishing the work on the boats, the men returned to the Bar to talk, drink, and watch television. (286). Around 8 o'clock, Torres,

whom Seijo knew from having seen him in the bar on several earlier occasions, came into the bar. (286). While Seijo sat at one end of the bar playing a "penny" game with some of the other patrons, he saw Torres and Hildebrandt conversing at the other end of the bar, but was too far away to hear what they were saying. (286). Torres then left, and Hildebrandt walked over to Seijo, telling him that Torres had said he would pay each of them $25.00 if they would go with him, presumably for protection, while he collected some money someone owed him. (287).

Seijo said that he would rather go home, but Hildebrandt insisted that they could go with Torres first, and then Hildebrandt would drive Seijo home. (287). Seijo agreed, but insisted that he be allowed to drive Hildebrandt's car, because Hildebrandt had been drinking too much. (287). They also gave Albrecht a ride, dropping him off at the Pelham Parkway. (288.) They then drove to a bar near Hildebrandt's store. While Hildebrandt went into the bar Seijo drove down the street to find a parking place. After some time, Hildebrandt and Torres emerged from the bar, Hildebrandt returning to the car where Seijo was waiting, and Torres entering his own car. (289). Hildebrandt and Seijo then followed Torres to the vicinity of the Howard

Johnson's parking lot, where Torres asked Seijo to drive his car into the lot while Torres went to meet the individual who was supposed to pay him the money. (291). Seijo complied, parking the car in the lot, and waiting there.(292). He observed Torres enter a car in the lot in which another man was waiting. (293). At that point, Seijo was arrested, frisked, and put in the back seat of a police car with Torres. (294-5). Moments later, the officers pulled them out of the car, and removed the seat, disclosing a package. (295-6). Although Torres, who had just been arrested in the possession of drugs, was sitting on the same seat, the police accused Seijo of having hidden the package behind the seat. Seijo insisted that he had not done so, and that the package was not his. (296, 299).

Seijo insisted that he had never threatened Torres, or financed any drug transactions by Hildebrandt, or told Torres that he had done such financing. (298). Indeed, when Seijo was arrested, he had only $1.56 on him. (298).

Charles Albrecht testified, corroborating Seijo's description of the activities of June 5th in which Albrecht had participated. (317-323).

Ascanio Radano, a retired New York City police officer after 20 years of police duty, testified that in

light of the type of clothing Seijo was wearing on the night of his arrest, it would have been virtually impossible for the police to over-look the 4 1/2" package found under the seat in the police car, if that package had been secreted on Seijo's person when the police frisked him. (274).

Di Domenico also testified in his own defense. (323-336).

The jury convicted Seijo of conspiracy (Count I) and the substantive count of possession with intent to distribute and distribution of heroin on June 5, 1974 (Count IV), but acquitted him on the charge of possession of the package of heroin found under the seat of the police car (Count V). Count VI, which had been severed from the case prior to trial, was subsequently dismissed with the consent of the Government.

The Presentence Report

The presentence report contained no evidence whatsoever, other than Torres' testimony in this case, that Seijo had ever been involved in narcotics transactions, or had financed such transactions, or had ever acted in a supervisory capacity in regard to such transactions.

Sentencing

At the sentencing proceeding, the trial judge told Hildebrandt that he was "a menace to society that should be removed for as long as I can remove you." Then, despite the fact that Seijo had no prior criminal record, the Court said that this same description applied to him "with even greater force." The Court, apparently prompted by the Assistant United States Attorney's claim that Seijo was the "supervisor" of the conspiracy (420), accused Seijo of being "the man behind the scenes," and sentenced him to fifteen years imprisonment, the maximum term possible under any one count.

ARGUMENT

I

THE FAILURE OF THE GOVERNMENT TO DISCLOSE THE PRIOR CONVICTION AND THE PERJURY AT TRIAL OF ITS PRINCIPAL WITNESS REQUIRES THE REVERSAL OF APPELLANT SEIJO'S CONVICTION.

Prior to the trial in this case, counsel for Seijo, pursuant to the informal discovery ordered by the trial judge, requested the United States Attorney's office for a copy of the "rap" sheet of one Leonard Torres, an alleged co-conspriator who was to testify as the Government's principal witness at trial. The prosecutor responded to this request by informing defense counsel that Torres had no prior convictions. During the trial, the prosecutor took advantage of this claim by eliciting from Torres, during the prosecutor's direct examination of that witness, testimony to the effect that he had no prior convictions. On cross-examination, Torres repeated this denial in response to a more specific question concerning whether he had ever been arrested for drugs while he was in the army. Throughout the trial and summation, the prosecutor sought to portray Torres as "the kid" who was not as "streetwise" as the other defendants and who had been lured into the alleged conspiracy by these other more culpable men. Numerous

of the defendants, including Seijo, testified in their own defense. In summation, the prosecutor, in urging the jury to credit Torres' testimony over that of the defendants, told them to "look at his [Torres'] prior record." He argued that since Torres had no prior convictions, and only one juvenile arrest on a charge of stealing baseballs which was eventually dismissed, Torres' testimony should be credited over the testimony of the other defendants, some of whom had records of prior conviction.

As a result of the post trial affidavit of the prosecutor in this case, Assistant United States Attorney Furtuin, (Set forth in appellant Seijo's separate appendix as **C**), counsel for Seijo has now been belatedly informed that Torres in fact did have a prior felony conviction for possession of a controlled substance, marijuana, in 1969, and that Torres' "rap" sheet, disclosing this conviction, was in the possession of the United States Attorney's office prior to the trial in this case. Thus, Torres' testimony on this matter was false, and the prosecutor's arguments based on that testimony were invalid.

The Supreme Court held in Brady v. Maryland, 373 U.S. 83, 87 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates

due process where the evidence is material either to guilt or to punishment . . . " This Court has held, as recently as last month, that evidence which could be used by the defense to impeach an alleged co-conspirator testifying as a Government witness is Brady material and thus subject to disclosure. United States v. Badalamente, - F.2d. - (Nos. 74-1517 et al., 2d. Cir. November 21, 1974).

The question of Torres' credibility was the critical issue, indeed the only issue, relevant to the jury's determination of Seijo's guilt or innocence in this case. Outside of Torres' testimony, the only evidence which the Government introduced as to Counts I and IV, the counts of which Seijo was convicted, was the testimony of surveillance officers that they observed Seijo get into Torres' car and drive it into the Howard Johnson's parking lot on the night of the June 5th transaction. Since mere presence at the scene of a crime in association with someone engaged in committing a crime and even with knowledge that the crime is being committed is insufficient to establish probable cause to arrest, let alone guilt, see eg. United States v. DiRe, 149 F.2d 818 (2d Cir. 1947), affirmed, 332 U.S. 581 (1948); United States v. Bazinet, 462 F.2d 982, 988 (8th Cir. 1972); United States v. Seay, 432 F. 2d 395 (5th Cir. 1970), cert. denied, 401 U.S. 945 (1971); United States v.

Vigo, 347 F. Supp. 1360, 1365 (S.D.N.Y. 1972), all of the evidence the Government was able to muster against Seijo outside of Torres' testimony was clearly insufficient to sustain Seijo's conviction or even substantially to corroborate Torres' claims as to Seijo's guilt. It was Torres' totally uncorroborated testimony that Seijo had told him that he was the man behind the drug transactions, and that Seijo had given Torres instructions as to the June 5th transaction and had come along to make sure that the transaction was successfully completed which provided the only basis on which the jury could have convicted Seijo on Counts I and IV.

Seijo, testifying in his own defense, directly contradicted these claims by Torres. He stated that he was not the man behind the transactions and had never so informed Torres. He explained that the only reason for his presence in Torres' car on the night of the June 5th transaction was that Torres had asked him to come along, presumably for protection, while Torres collected some money someone owed him. Seijo testified that he was never informed and did not know that the money to be collected was for a drug sale, and that he had no knowledge of or participation in any of the other transactions or the conspiracy charged in the indictment.

If the jury had chosen to credit Seijo instead of Torres, they could also have credited the testimony of the surveillance officers concerning Seijo's driving Torres' car into the parking lot as being entirely consistent with Seijo's innocence. The jury's determination of Seijo's guilt or innocence thus turned solely on which of Torres' and Seijo's conflicting claims they chose to believe. In this context, evidence to impeach Torres' credibility became critical. United States v. Badalamente, supra.

Torres' credibility was subject to serious question, and the impeachment of his testimony was the keystone of Seijo's presentation at trial. Torres was an admitted co-conspirator, who, according to police witnesses, had negotiated each of the transactions described in the indictment and had in each case delivered the drugs. The observations of the testifying police officers were such that Torres' guilt of the crimes charged was irrefutable, even without his cooperation. His only hope of leniency, a hope which it turns out was well-founded in light of his probationary sentence, was to aid the prosecution in any way possible, even perhaps through false testimony, to incriminate the defendants in this trial before the judge who was to sentence him. Even without the Brady material which

is the subject of this appeal, Torres' credibility was so questionable that the jury chose to disbelieve him in part in acquitting Seijo on Count V of the indictment. Seijo, on the other hand, had never been observed by the police either transacting in or possessing drugs. Significantly, Seijo also had no prior criminal record.

Given the primacy of Torres' credibility to the question of Seijo's guilt, and given the already apparent weaknesses in Torres credibility, the information that Torres had a prior felony conviction for possession of a controlled substance was vital to the efforts of Seijo's counsel to create a reasonable doubt in the jurors' minds as to Torres' incrimination of Seijo. First, counsel would have used this information to establish that Torres had perjured himself, in both direct and cross-examination, in denying any prior arrests or convictions for drug offenses. This clear example of perjury would certainly have had a substantial impact on the jury's decision as to whether to believe the rest of Torres' testimony instead of believing Seijo. Secondly, the evidence of Torres' prior drug felony would have severely undercut the prosecutor's efforts to bolster Torres' credibility by portraying him as a relatively innocuous young man who was lured into the alleged conspiracy

by his more culpable and "streetwise" co-defendants. Finally, the existence of Torres' prior conviction would have eliminated entirely the prosecutor's argument on summation that Torres was a more credible witness because he had no prior criminal convictions. Given the significance of Torres' prior record, the Government's failure to turn over this information at defense counsel's request constituted a clear due process violation. Brady v. Maryland, supra.

In recent months, this Court has repeatedly warned the United States Attorney's office for the Southern District of New York of the importance of compliance with the requirements of Brady v. Maryland, 373 U.S. 83 (1963), and more specifically of the importance of providing the defense with Brady material going to the credibility of an alleged co-conspirator who is testifying as a Government witness. See eg. United States v. Badalamente, - F.2d -, (Nos. 74-1517 et al. 2d Cir. November 21, 1974); United States v. Sperling, - F.2d - (Nos. 72-2363 et al., 2d Cir. October 10, 1974); United States v. Pacelli, 491 F.2d 1108, 1119 (2d Cir. 1973); United States v. Pfingst, 447 F.2d 177, 194-5 (2d Cir. 1973); United States v. Polisi, 416 F.2d 573, 577-9 (2d Cir. 1969); see also United States v. Mayersohn, 452 F.2d 521 (2d Cir. 1971). The failure of that office to

turn over such material has required the reversal of the convictions of numerous defendants in the above-cited cases. Yet despite these warnings, the Government argues in Assistant United States Attorney Fortuin's affidavit of December 17, 1974 (See C of Seijo's separate appendix at 1-3), and is expected to argue in this appeal that its failure to produce the information in question was not a Brady violation because there is no evidence that the Government acted in bad faith. Although Mr. Fortuin concedes that the rap sheet disclosing Torres' prior conviction was received by his office almost one month before the trial commenced, he claims that it was not brought to his personal attention until well after the trial was concluded. These allegations, however, provide the Government with no defense to their Brady violation. Brady itself, unequivocally holds that the failure to turn over such information is a violation of due process "irrespective of the good faith or bad faith of the prosecution." (Id. at 87). This Court, confronted with a similar argument by the Government in United States v. Sperling, supra, rejected it, noting that the prosecutor's office is to a certain extent to be considered an "entity," and that the failure to comply with statutorily (or in this case constitutionally) required dis-

closure "cannot be excused as due to a breakdown in channels of communication." (Citing Giglio v. United States, 405 U.S. 150, 154 (1972). United States v. Sperling, supra, slip sheet at 5649) Whether through inadvertence or otherwise, the end result of the prosecutor's claim to defense counsel that Torres had no prior record of conviction was to misled both counsel and the jury to the substantial prejudice of appellant Seijo. For this reason, this case must be remanded for a new trial at which Seijo's counsel can use both Torres' prior felony drug conviction and the fact of his perjury at the first trial to discredit his testimony.

II

THE DISTRICT COURT, IN SENTENCING SEIJO TO FIFTEEN YEARS' IMPRISONMENT AND THREE YEARS' SPECIAL PROBATION, ACTED ON THE BASIS OF ERRONEOUS INFORMATION, IN VIOLATION OF THE SENTENCING STANDARDS AND IN ABUSE OF ITS SENTENCING DISCRETION.

The presentence report in this case established that Seijo had no prior convictions and had had "satisfactory" employment in recent and prior years. His only other involvement with the courts was a pending non-support action. The report contained no evidence whatsoever that Seijo had ever been previously involved in narcotics transactions, or that he had financed or supervised the conspiracy in the present proceeding. Yet the sentencing judge, indicating that he considered Seijo the most culpable of the defendants because the Judge thought Seijo was the "man behind the scenes," or supervisor of the operation, sentenced this first-time offender to fifteen years' imprisonment, the maximum possible sentence under any one count of the indictment.

A. The sentence is invalid because it was based on erroneous information.

The only indication of any sort in the testimony at trial, the presentence report, or any other source that Seijo was the supervisor or the "man behind the scenes" in the alleged conspiracy in this case was the totally uncorroborated

testimony of Torres that Seijo had said he had lent money to Hildebrandt to finance the drug transactions. However, as indicated in Point I, supra, Torres' testimony, particularly those uncorroborated parts of his testimony, is now subject to serious challenge in light of Torres' perjury at trial and the Government's failure to turn over, at the defense's request, the information which would have exposed that perjury and impeached Torres' credibility.

The Supreme Court, in Brady v. Maryland, supra, 373 U.S. at 87, held that a due process violation occurs if the prosecution withholds information which is material to "punishment" as well as to guilt. Here, the sentencing Judge made clear that the central factor which induced him to impose the fifteen-year sentence on Seijo was Torres' portrayal of Seijo as the key man in the conspiracy. At the time of Seijo's sentencing, as at trial, defense counsel had not been provided with Torres' "rap" sheet, and therefore was unable to dissuade the sentencing Judge from crediting Torres' claims. By virtue of the Brady violation the Judge, in evaluating Torres' credibility, was under the erroneous impression that Torres had not perjured himself at trial and that he did not have a prior drug-related felony conviction. Consequently, both Brady and the cases invalidating sentences based on erroneous information (see, e.g., Townsend v. Burke, 334 U.S. 736 (1948); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970)) require that Seijo's sentence be vacated and that the case be remanded for re-sentencing by a court which

is fully informed of Torres' perjury and prior conviction before deciding whether to credit his claims of Seijo's supervisory role.

B. Since the sentencing judge did not find that Torres' allegation that Seijo was the "man behind the scenes" in the charged conspiracy had been proven beyond a reasonable doubt, it was error for the Judge to impose sentence on the basis of that allegation.

The jury convicted Seijo of conspiracy (Count I) and possession with intent to distribute and distribution of drugs on June 5 (Count IV). It was not necessary for the jury, in rendering this verdict, to credit Torres' claim that Seijo was the central figure in the conspiracy.* Moreover, Seijo himself never conceded, either at trial or sentencing, the validity of Torres' claim. To the contrary, he consistently denied that he had played such a role in the crimes charged. However, the Judge at sentencing clearly indicated that Torres' totally uncorroborated

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*The jury's verdict could have rested solely on their belief that Seijo, by driving Torres' car on June 5, aided and abetted Torres' distribution of drugs on that date (Count IV) and that he did so with a general knowledge of the conspiracy (Count I). The jury may well have found more than a reasonable doubt concerning Torres' claim of Seijo's supervisory role, just as they clearly discredited part of his testimony when acquitting Seijo of the crime charged in Count V.

testimony on this matter was the principal reason for the severity of Seijo's sentence.

It would indisputably be a violation of due process for a court to sentence a defendant for a more serious crime than the one of which he was actually convicted. A similar due process violation occurs if a judge, even while restricting himself to the maximum sentence permissible under the statute for the crime of which a particular defendant has been convicted, sentences that defendant more severely because he suspects that defendant of a greater culpability than was actually proven at trial. Consequently, in cases such as this, where an allegation concerning the defendant is not necessary to the jury's determination of guilt, and is not conceded by the defendant, the sentencing court violates due process if it considers that allegation in sentencing without first expressly finding that the allegation was proven beyond a reasonable doubt. This Court recently imposed such a requirement on sentencing judges when the defendant's suspected perjury at trial was being considered:

> ... [W]e hold today that in the future perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it.
>
> United States v. Hendrix, ___ F.2d ___, slip opinion at 5810-5811 (No. 74-1603, October 15, 1974).

No rational basis exists for distinguishing between Torres'

claim in this case from the perjury being considered in Hendrix.

Although the judge at sentencing did say that it was "clear as day" that Seijo was the "man behind the scenes," this informal characterization can scarcely be considered the equivalent of the legal standard of proof beyond a reasonable doubt. Moreover, the court nowhere indicated that it considered itself obligated to find that this allegation was proven beyond a reasonable doubt before considering it in sentencing. In light of the total lack of corroboration of Torres' claim to this effect, and the serious doubts raised both at trial and in this appeal (see Points I and I-A, supra), it is questionable that the court would have found that the claim by Torres met this high standard of proof. Consequently, this case should be remanded so that the sentencing judge may determine whether the claim was proven beyond a reasonable doubt before using it as the basis for Seijo's sentence.

C. The absence of any substantive standards for the imposition of sentence violates due process and requires vacature of the judgment and a remand for resentence in accord with due process.

In United States v. Velazquez, 482 F.2d 139 (2d Cir. 1974), that appellant argued that the absence of substantive standards for the imposition of sentence in the Federal court violated her right to due process of law, and urged this Court

to adopt the substantive criterion that the sentence imposed be the least restrictive alternative consistent with the goals of punishment. This Court, while noting that

> [t]he present system of sentencing has come under frequent and sometimes telling criticism, e.g., M. Frankel, Sentences: Law Without Order 3-49 (1973); The President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts 23-25 (1967)...
>
> (Id., at 141),

held that the Velazquez case was not an appropriate vehicle for considering the imposition of such a criterion since

> the sentence imposed on appellant was substantially less than the statutory maximum.... [T]he appellant did not request from Judge Tenney either an explanation of his reasons for imposing the 18 month sentence or disclosure of the pre-sentence report.
>
> (Id., at 141-142).

In the present proceeding, all three of these preconditions are met. The court at sentencing, contrary to considering the "least restrictive alternative," said of a co-defendant that he "should be removed for as long as I can remove you," and subsequently informed Seijo that what the court had said to the co-defendant "applies to you with even greater force." Then, after accusing Seijo of being the "man behind the scenes," the court imposed on this first-time offender a sentence of fifteen years' imprisonment, the maximum allowable under any one count. The presentence report contained no in-

formation which could justify such a severe sentence. In light of the unjustifiably severe sentence imposed, this Court should now examine the pressing need for its recognition of the "least restrictive alternative" criterion in sentencing, and the due process violation which arises in the absence of such a standard.

The sentencing process in the Federal courts has been subjected to increasing criticism from jurists and legal scholars because of the virtual absence* of substantive standards to guide the sentencing judge. As Judge Frankel recently noted, when the action of a judge in imposing snetences is limited by nothing other than a statutory maximum term, it is arbitrary and irrational:

> The statutes granting such powers characteristically say nothing about the factors to be weighed in moving to either end of the spectrum or to some place in between. It might be supposed ... that the criteria for measuring a particular sentence would be discoverable outside the narrow limits of the statute and would be known to the judicial experts rendering the judgments. But the supposition would lack substantial foundation.
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> Lawlessness in Sentencing, 41 U. of Cincinnati L. Rev. 1, 4 (1972).

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*The only meaningful substantive standard is the "individualization" rule of Williams v. New York, 337 U.S. 241 (1949), which held that the sentencing judge must consider the defendant's life and characteristics, and that the penalty must fit the offender as well as the crime.

What is more, the absence of substantive standards encourages irrational, arbitrary, and secretive sentences. The problem was stated succinctly by Mr. Justice Stewart when, as a Circuit Judge, he wrote:

> Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives.... It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this important dimension of fundamental justice.
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> Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958).*

The unfettered and unguided power of the American trial judge is unique in the world,** and serious abuse of such incredible discretion is inevitable. Judge Sobeloff, of the Fourth Circuit Court of Appeals, has said:

> It is [at sentencing] that the whole intricate network of protections and safeguards which were [the defendant's] at the trial vanishes and gives way to the widest latitude of judicial discretion. What happens at this juncture

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*Fairness in sentencing is especially important when it is recognized that seventy to ninety percent of defendants plead guilty in all jurisdictions. American Bar Association Project on Minimum Standards for Criminal Justice, Appellate Review of Sentences at 1 (Approved Draft, 1968).

**Goldfarb and Singer, After Conviction at 190-91 (1973); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 25 (1967).

> depends largely on the judge's conscience or, as some have suggested, the state of his digestion.
>
> Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Circuit Court of Appeals for the Second Circuit, 32 F.R.D. 249, 265 (1962).

That the irrational, arbitrary, and secretive power of sentencing judges leads to disparate sentences in this Circuit is affirmed by a study of the United States Attorney for the Southern District of New York, which concludes that

> [t]he chances of a defendant going to jail are still largely determined by which judge his case is assigned to.... Permitting these differences in personal opinion to control sentencing largely destroys the ideal of evenhanded justice for the individual defendant.
>
> Sentencing Study, at 8 (1972).*

Also, the irrational atmosphere which results in wildly unpredictable sentences gives the courts an atmosphere of injustice and results in making rehabilitation more difficult.**

The virtual absence of substantive standards in sentencing is inexplicable, since sentencing is an inseparable and critical part of the criminal process, Brady v. United States,

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*Examples of sentencing disparity are set forth in the same Study at 12-14. The study covers the period from May 1, 1972 to November 30, 1972.

**Irrational sentences are a primary source of prisoners' complaints. See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society at 141-45 (1967); Frankel, Lawlessness in Sentencing, supra, 41 U. of Cincinnati L. Rev. at 12.

41 U.S.L.W. 4368 (Sup.Ct., March 5, 1973), which is otherwise structured with articulate principles and safeguards, and there is no doubt that due process principles are applicable to the sentencing process as well. Townsend v. Burke, 334 U.S. 736 (1948); United States v. Tucker, 404 U.S. 443 (1972). The result of the absence of standards is unfairly and excessively to subscribe liberty -- the fundamental right guaranteed by the Constitution. Significantly, American judges, operating in a substantive and procedural void, hand down the longest prison sentences in the Western world.*

That a primary function of the due process clause is to protect liberty against arbitrary limitation by governmental power has often been decided by the Supreme Court. For example, in Slocher v. Board of Higher Education of New York City, 350 U.S. 551 (1956), the Court struck down a provision of the New York City charter which mandated the automatic firing of a college professor who refused to answer questions before a Congressional committee. Mr. Justice Clark, writing for the majority, noted that the protection of the individual against arbitrary action was "the very essence of due process," 350 U.S. at 559. Similarly, Mr. Justice Fortas, in In re Gault, 387 U.S. 1 (1967), wrote, while deciding that juvenile court proceedings arbitrarily deprived minors of fundamental rights:

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*Frankel, An Opinion by One of Those Softheaded Judges, The New York Times Magazine, May 13, 1973, at 41.

> Due process is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise.
>
> Id., 387 U.S. at 20.

In Nebbia v. New York, 291 U.S. 502, 528 (1934), the Court clearly stated the principle:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, did not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.
>
> Id., at 525.

And in Jones v. Securities Commission, 298 U.S. 1, 23-24 (1936), the Court was eloquent. Speaking of the Commission's refusal to permit the withdrawal of a registration statement, the Court said:

> The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest -- that this shall be a government of laws --, because to the precise extent that the mere will of an official or an official body is permitted to take the place of

> allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy....
>
> Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day -- "there is no place in our constitutional system for the exercise of arbitrary power."

See also, e.g., Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966); Barsky v. Board of Regents, 347 U.S. 442, 459, 462-63 (1954) (dissenting opinion of Mr. Justice Black); Malinski v. New York, 324 U.S. 401, 417 (1945) (opinion of Mr. Justice Frankfurter).

Thus, at a minimum, the protections afforded by due process require that limitations on the liberty of an individual, like limitations on other fundamental rights, must be insulated from irrational and arbitrary deprivation.

Appellant urges that this Court adopt standards of substantive law to guide district judges in ascertaining the constitutional limitations on the deprivation of a convicted defendant's liberty.* The appropriate criterion for for the deprivation of liberty is that the penalty be the least restrictive alternative consistent with the goals of

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*There is no limitation on the Court's power to establish due process standards. See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972); In Re Gault, 387 U.S. 1 (1967).

of punishment.* The application of this constitutional principle to sentencing requires that whatever the goal of punishment in the individual case -- retribution, deterrence, rehabilitation, or isolation -- the sentence should involve the least serious punishment to accomplish the end.

The least restrictive alternative standard is applicable to sentencing because it is the traditional due process test for governmental limitation on fundamental constitutional rights. In Shelton v. Tucker, 364 U.S. 479 (1960), the Court, in striking down an Arkansas law that required all teachers to file annual affidavits listing membership in every organization to which the teacher belonged, noted:

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

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*See, for example, the Statement of Purpose and Policy of the National Counsel on Crime and Delinquency, Model Sentencing Act, §1 (1972 revision):

> The purpose of penal codes and sentencing is public protection. Sentences should not be based upon revenge and retribution. The policy of this Act is that dangerous offenders shall be identified, segregated and correctively treated in custody for long terms as needed, and that other offenders may be committed for a limited period. Nondangerous offenders shall be dealt with by probation, suspended sentences, or fine wherever it appears that such disposition does not pose a danger of serious harm to public safety.
>
> Persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation, considering their individual characteristics, circumstances, and needs.

Similarly, in Aptheker v. Secretary of State, 378 U.S. 500 (1964), the Court, in striking down a provision that limited the right to travel of members of the Communist Party, ruled that "Congress ha[d] within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security." Id., 378 U.S. at 512-13. The Shelton least restrictive alternative theory, has been applied to innumerable fundamental liberties, including recently the right to peaceful picketing near schools (Police Department of Chicago v. Mosley, 408 U.S. 92, 101 (1972)), and the right to vote without unreasonable residence durational requirements (Dunn v. Blumstein, 405 U.S. 330, 343 (1972)). The principle has even been applied to prohibit excessive limitations on the rights of pretrial detainees (Brenneman v. Madigan, 343 F.Supp. 128, 138 (N.D.Cal. 1972)), and to protect the rights of patients civilly committed to mental hospitals (Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969)).

The view that proper punishment involves the least possible imprisonment is compelled by the need to protect liberty of the individual from the arbitrary and capricious limitations imposed by the present sentencing system. Recently, Mr. Justice Brennen wrote, while concurring in Furman v. Georgia, 408 U.S. 238 (1972):*

*Furman concerned a challenge to capital punishment based on the cruel and unusual punishment clause.

> The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.
>
> Id., 408 U.S. at 279.

This principle, that a severe punishment "serves no penal purpose more effectively than a less severe punishment," id., 408 U.S. at 280, was recognized by the Court in Weems v. United States, 217 U.S. 349, 381 (1910),* and is implicit in Mr. Justice Douglas' concurrence in Robinson v. California, 370 U.S. 660 (1962), when he wrote that "a punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" Id., 370 U.S. at 676.**

The least restrictive alternative theory of punishment has been urged by the current and extensive studies of sentencing and sentencing problems, including the National Council on Crime and Delinquency, supra, the American Law

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*Weems concerned a challenge to a lengthy prison sentence based upon an unfair law governing the Philippines. The challenge was based upon cruel and unusual punishment.

**In Robinson, the Court struck down addiction as a "status" crime.

Institute Model Penal Code,* and the American Bar Association, which suggests:

> The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.
>
> American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, §2.2 at 14 (Approved draft, 1968).

In the present proceeding, the District Court clearly rejected the "least restrictive alternative" theory, saying rather that he was imprisoning Seijo "for as long as I can remove you." This case should therefore be remanded for resentencing with instructions that the sentencing judge impose the least restrictive sentencing alternative appropriate for this first-time offender.

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*American Law Institute, Model Penal Code - Sentence Provisions, §7.01(1) (1967), provides:

> The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public.

CONCLUSION

For the above-stated reasons, appellant Seijo's conviction and/or sentence should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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Certificate of Service

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.